**TNT Skypak, Inc. *and* Local 851, International Brotherhood of Teamsters, AFL–CIO.** Cases 29–CA–17875, 29–CA–18051–2, and 29–CA–18507

May 24, 1999

## DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On September 8, 1995, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party filed an answering brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.

### AMENDED REMEDY

The judge found, and we agree, that the Respondent bargained in bad faith in violation of Section 8(a)(5) and (1) of the Act by reneging on tentative agreements previously made during the course of negotiations with the Union. More specifically, the judge found that on August 27, 1993, the Respondent withdrew from numerous tentative agreements with the Union "because it became apparent that the Union was about to accept virtually all of the Company's positions thereby making a contract inevitable."[2]

In fashioning an appropriate remedy, the judge recognized that it would not be sufficient merely to return the parties to the bargaining table. Agreeing with the position of the General Counsel and the Charging Party, the judge's remedy granted the Union the option of accepting or rejecting the Respondent's contract proposals as they stood prior to August 27, 1993, the date of the Respondent's unfair labor practice. Consistent with the Respondent's wage proposal, which contemplated a 3-year contract, the judge further provided that if the Union accepted the Respondent's contract proposals, the resulting collective-bargaining agreement would be for a 3-year term. Finally, if the Union elected to accept the Respondent's proposals, the judge stated that the collective-bargaining agreement would be given retroactive effect, i.e., the commencement date would be September 1, 1993.

In its exceptions, the Respondent contends, inter alia, that while the "Board certainly has the authority to restore the status quo ante," and order reinstatement of the Respondent's proposals as they existed prior to August 27, 1993, the Board cannot "order retroactivity as a remedy when the terms of all proposals made by the parties expressly provide for prospective relief." In this connection, the Respondent cites to the "Duration" clause, which states that the agreement shall be effective "from the date of execution thereof" and to the "Wages" clause, which provides for a general wage increase "effective on the signing of an agreement." The Respondent argues that the "execution" and "signing" of the agreement can occur, if at all, only after the issuance of the Board's decision. Therefore, according to the Respondent, the judge should have ordered only prospective application of any contract that results from the Union's acceptance of the Respondent's contract proposals.

In support of its position, the Respondent relies on *Driftwood Convalescent Hospital*.[3] In that case, the Board agreed with the judge that as part of the remedy for the employer's unlawful withdrawal of its contract proposals, the employer must be required to reinstate its final offer and afford the union an opportunity to accept it. Contrary to the judge, however, the Board held that any resulting contract would be given only prospective effect because the employer's final offer provided that the duration of the agreement was dependent on the date of the union's acceptance. The Board distinguished its prior decisions in *Northwest Pipe & Casing Co*., 300 NLRB 726 (1990), and *Mead Corp*., 256 NLRB 686 (1981), enfd. 697 F.2d 1013 (11th Cir. 1983), on the ground that the employer proposals in those cases expressly provided for retroactivity.

In its brief in answer to the Respondent's exceptions, the Charging Party contends that *Driftwood* was wrongly decided. The Charging Party argues that the remedy ordered by the Board in *Driftwood* does not effectuate the policies of the Act because it has the effect of rewarding the employer for its own misconduct and it fails to compensate the employees for the damage caused by the unlawful conduct.

After the completion of briefing, the Respondent and the Union advised the Board of the following post-hearing developments. In 1995, the Respondent and the Union resumed negotiations, which culminated in collective-bargaining agreements effective from November 8, 1995, through August 31, 1996, and September 1, 1996,

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We also agree with the judge that in January 1995 the Respondent withdrew recognition from the Union in violation of Sec. 8(a)(5) and (1) of the Act. The judge, however, inadvertently failed to provide in his recommended Order that the Respondent shall cease and desist from such conduct. We shall modify the recommended Order accordingly. We shall also modify the recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container*, 325 NLRB 17 (1997).

[3] 312 NLRB 247 (1993), enfd. 67 F.3d 307 (9th Cir. 1995).

through August 31, 1999. However, the 1996–1999 agreement was voluntarily terminated by the parties pursuant to the terms of a closing agreement, dated December 23, 1997, which set forth the parties' understandings and agreements in connection with the Respondent's decision to cease operations at its Long Island City, New York facility.

In the closing agreement, the parties acknowledged that the Union "is not agreeing to withdraw, resolve or otherwise dismiss Case No. 29–CA–17875." However, the parties agreed that "any liability or obligation arising as a consequence of 29–CA–17875 should be limited to a financial liability up to November 8, 1995, which amount shall be resolved between the parties as provided by law under the National Labor Relations Act, and specifically TNT will have no obligation, and Local 851 relinquishes any obligation, to recognize and bargain with Local 851 as to the unit described in 29–CA–17875, whether by contract, or by applicable law, including the National Labor Relations Act on and after December 26, 1997."[4]

In light of the closing agreement, the remaining remedial issue before us is whether the judge properly determined that, if the Union elects to accept the Respondent's reinstated proposals, the resulting collective-bargaining agreement will be given retroactive effect. If the judge's remedy is correct, then the former unit employees will be entitled to approximately 2 years' backpay (ending in November 1995). On the other hand, if the contract must be given prospective effect, no backpay would be due because the bargaining unit no longer exists.

For the reasons set forth below, we find, in agreement with the Charging Party's contentions, that the remedy recommended by the judge better effectuates the policies of the Act than the remedy provided by the Board in *Driftwood*. Accordingly, we overrule *Driftwood* to the extent it is inconsistent with our decision today.

Having found that the Respondent violated the Act by reneging on tentative agreements made in the course of negotiations, we are authorized, under Section 10(c), to issue an order requiring "such affirmative action including . . . backpay, as will effectuate the policies of the Act." Our task in applying Section 10(c) is "to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice." *Franks v. Bowman Transportation Co*., 424 U.S. 747, 769 (1975).

In fulfilling that responsibility, we are guided by well-established precedent involving employer refusals to execute agreed-upon contracts. In that situation, the Board, with court approval, has ordered the employer to execute the agreed-upon contract and give it retroactive effect. E.g., *Gadsden Tool, Inc*., 327 NLRB 164 (1998); *Crimptex*, *Inc*., 221 NLRB 595 (1975); *Raven Industries*, 209 NLRB 335 (1974), enfd. as modified 508 F.2d 1289, 1291–1292 (8th Cir. 1974); *Sel-Low Discount*, 205 NLRB 449, 452 (1973). Indeed, the Board's authority to order such retroactive relief has been upheld by the Supreme Court. See *NLRB v. Strong Roofing & Insulating Co*., 393 U.S. 357 (1969).

In *Crimptex*, for example, the Board squarely addressed the question of whether the collective-bargaining agreement that the respondent had unlawfully refused to execute should be given prospective or retroactive effect. Like the parties' "Duration" clause in the instant case, the collective-bargaining agreement in *Crimptex* provided that it "shall become effective on the date of its execution." 221 NLRB at 595. And like the Respondent in the case at bar, the employer in *Crimptex* argued that the effective date of the collective-bargaining agreement should be the date of physical execution. The Board, however, rejected this contention, stating that "it does not follow that, where Respondent has delayed execution of the agreement by its unlawful conduct, the date of physical execution of the agreement is the effective date of said agreement. Rather, the crucial date here is that initial date upon which, *but for* Respondent's unlawful conduct, the agreement would have been executed." Id. (Emphasis in original.) The Board concluded that the effective date of the agreement was the date the Respondent unlawfully refused to execute it. "To allow any later effective date of the agreement would permit Respondent to benefit from its unlawful conduct." Id.

Similarly, in the instant case, the delay in executing a collective-bargaining agreement is attributable to the Respondent's own unlawful conduct, i.e., its bad-faith withdrawal from numerous tentative agreements with the Union. Therefore, under *Crimptex*, "it does not follow that . . . the date of physical execution of the agreement is the effective date of said agreement. Rather, the crucial date here is that initial date upon which, *but for* Respondent's unlawful conduct, the agreement would have been executed." Id. Although there is no absolute certainty that the parties would have immediately reached a final and complete agreement had the Respondent's proposal not been unlawfully retracted on August 27, 1993, the judge specifically found that in the Union's August 2, 1993 draft contract, the Union had, "in effect, throw[n] in the towel" and "essentially accepted the Company's demands." Based on his careful review of the evidence, the judge was convinced that had the negotiations stayed on track, "no reasonable person could doubt that a collective bargaining agreement would have been reached within a matter of days." In short, the judge drew the reasonable inference, well supported by the record, that, but for the

[4] Pursuant to the closing agreement, the Union has requested withdrawal of its unfair labor practice charges in Cases 29–CA–18051–2 and 29–CA–18507. The request is granted, the complaint allegations related thereto are dismissed, and the judge's Conclusions of Law 3 and 4 are deleted. We shall modify the judge's recommended Order accordingly. In light of the closing of the Respondent's Long Island City facility, our Order shall provide for mailing of the notice.

Respondent's unlawful conduct, the parties would have concluded a collective-bargaining agreement in August 1993.

Furthermore, to the extent there is a lack of certainty on this point, such uncertainty should be resolved against the Respondent as the wrongdoer. As the Supreme Court stated in *Bigelow v. RKO Pictures*, 327 U.S. 251, 256 (1946), "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of uncertainty which his own wrong has created." See *Leeds & Northrup Co. v. NLRB*, 391 F.2d 874, 880 (3d Cir. 1968) ("While it is true that a retroactive order might afford the employees a better position than the union's bargaining might have achieved, the Board can hardly be said to be effectuating policies beyond the purposes of the Act by resolving the doubt against the party who violated the Act."). Application of the *Driftwood* remedy, on the other hand, would not effectuate the policies of the Act because it would permit the Respondent to benefit from the delay it caused by its unlawful conduct. Indeed, in light of the closing of the Long Island City facility, to order only prospective application of the contract in this case would allow the Respondent to escape liability for its unlawful conduct, leaving that conduct essentially unremedied.

In sum, because the judge found that, had the Respondent bargained lawfully, in all likelihood the Union would have accepted the Respondent's contract proposals in late August 1993, and because any uncertainty that exists on this score must be resolved against the Respondent as the wrongdoer, we hold that any collective-bargaining agreement that results from the Union's acceptance of the Respondent's reinstated proposals should be given retroactive effect and commence on August 27, 1993, the date of the Respondent's unfair labor practice. Consistent with the terms of the parties' Closing Agreement, the Respondent's liability ends on November 8, 1995. Unlike the prospective remedy in *Driftwood*, this remedy furthers the policies of the Act because it recreates, as nearly as possible, the circumstances and relationships that likely would have resulted had the unfair labor practice in question not occurred. In addition, our remedy "both compensate[s] the party wronged and withhold[s] from the wrongdoer the fruits of its violation." *Electronic Workers IUE v. NLRB*, 426 F.2d 1243, 1249 (D.C. Cir. 1970), cert. denied 400 U.S. 950 (1970).

Our decision does not run afoul of the Court's holding in *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970), that the Board does not have the statutory authority to "compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement." Here, the Respondent voluntarily agreed to a proposal that provided that the collective-bargaining agreement would become effective upon "execution." Our remedial Order, like the Board's remedial order in *Crimptex*, merely provides that where the Respondent's unlawful conduct frustrates the formation of a contract, the "execution date" is the date the agreement would have been executed but for the Respondent's unfair labor practice. To the extent there is any uncertainty about that date, the uncertainty is resolved against the Respondent, under well-established remedial principles.

## ORDER

The National Labor Relations Board orders that the Respondent, TNT Skypack, Inc., Long Island City, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Bargaining in bad faith by reneging on tentative agreements previously reached by the parties with the intent of avoiding the making of a collective-bargaining agreement.

(b) Unlawfully withdrawing recognition from Local 851, International Brotherhood of Teamsters, AFL–CIO.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reinstate the proposal for a collective-bargaining agreement as it existed as of June 29, 1993, and afford the Union 30 days to accept or reject that proposal. If the Union accepts the proposal within 30 days, sign a contract containing all of the terms and conditions of employment of the proposal, give the agreement retroactive effect from August 27, 1993, until November 8, 1995, and make unit employees whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), and *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the amount of backpay due under the terms of this Order.

(c) Mail, at its own expense, a copy of the attached notice marked "Appendix"[5] to all current and former employees employed by the Respondent at any time since August 27, 1993. Such notice shall be mailed to the last known address of each employee. Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of a United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

representative, shall be mailed within 14 days after service by the Region.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not specifically found.

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to mail and abide by this notice.

WE WILL NOT bargain in bad faith by reneging on tentative agreements previously reached between us and Local 851, International Brotherhood of Teamsters, AFL–CIO, with the intent of avoiding the making of a collective-bargaining agreement.

WE WILL NOT unlawfully withdraw recognition from the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reinstate our proposal for a collective-bargaining agreement as it existed on June 29, 1993, and WE WILL afford the Union 30 days to accept or reject that proposal. If the Union accepts the proposal within 30 days, WE WILL sign a contract containing all of the terms and conditions of employment of the proposal, WE WILL give the contract retroactive effect from August 27, 1993, until November 8, 1995, and WE WILL make unit employees whole for any loss of earnings and other benefits, with interest.

TNT SKYPACK, INC.

*Saundra B. Rattner, Esq.,* for the General Counsel.
*Clifford Chaiet, Esq. (Kaufman, Naness, Schneider & Rosensweig, P.C.)*, for the Respondent.
*Kyle Flaherty, Esq. (Robinson, Silverman, Pierce, Aronshon & Berman),* for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Brooklyn, New York, on April 3 and 4 and May 22 and 23, 1995. The charge in Case 29–CA–17875 was filed on December 3, 1993, and the first amended charge was filed on March 8, 1995. The charge in Case 29–CA–18051–2 was filed on March 11, 1994, and the first amended charge in that case was filed on March 31, 1994. The charge in Case 29–CA–18507 was filed on September 6, 1994.

A complaint in 29–CA–17875 was issued on February 15, 1994, and as amended at the hearing, alleged in substance that (a) the Union, pursuant to an election held on September 6, 1991, was certified on October 1, 1991; (b) that from October 1991 until November 19, 1993, the Union and the Company engaged in collective bargaining; (c) that on or about August 27, 1993, the Company reneged on various bargaining proposals that it had made on May 26, 1993 and June 29, 1993; (d) that on October 19, and November 19, 1993, the Respondent by its attorney told the Union's representatives that it was unwilling to agree to terms that were superior to the terms and conditions of employment of the Company's unrepresented employees; (e) that on October 19, 1993, the Respondent's attorney told the Union that it had problems with the Union in the past and preferred not to deal with the Union at all; (f) that on October 19 and November 19, 1993, the Respondent's attorney told the Union that its August 27, 1993 contract proposal was its final offer, that there would be no flexibility in its bargaining position and that it would not offer anything else to the Union; (g) that on January 25, 1995, the Respondent withdrew recognition from the Union; and (h) that by its overall conduct since June 6, 1993, the Respondent engaged in bad-faith bargaining for the unit consisting of all full-time and regular part-time drivers.

On May 27, 1994, the Regional Director issued a complaint in Case 29–CA–18051–2. This alleged in substance (a) that in late December 1993, the Respondent promulgated a rule prohibiting its employees at its Long Island facility from reporting to work at the facility more than 10 minutes before their scheduled starting times; (b) that since late December 1993, the Respondent has enforced this rule selectively and disparately by applying it only to employees who supported the Union; (c) that in January 1994, the Respondent changed the scheduled starting time of Jose Vasquez from 8 to 9 a.m.; (d) that in early February 1994, the Respondent changed the starting time of Jose Vasquez from 9 to 9:15 a.m.; (e) that on February 24, 1994, John Carreto, the Respondent's supervisor, promised employees pay increases and a 4-day week of 10 hours per day, if they chose to no longer be represented by the Union; (g) that on March 1, 1994, the Respondent changed the starting time of Jose Vasquez from 9:15 to 9:30 a.m.; (h) that in March 1994 the Respondent changed the starting time of Michael Yanis, (the Union's shop steward), from 8:30 to 9 a.m.; and (i) that on March 25, 1994, the Respondent prohibited employees Jose Vasquez and Michael Yanis from talking to each other.

On October 20, 1994, the Regional Director issued a complaint in Case 29–CA–18507 which alleged, (a) that at all times before March 31, 1994, the Company allowed the employees the privilege of picking their vacation schedules in order of seniority; (b) that on March 31, 1994, the Respondent changed its vacation procedure to eliminate the seniority privilege described previously; (c) that this change was done unilaterally without notice to the Union; and (d) that as a consequence, the employer violated Section 8(a)(1) and (5) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

TNT Worldwide is a Dutch company, which in turn is a division of TNT Limited, an Australian corporation. The Respon-

dent is part of the United States operations of TNT Worldwide and it has its principle office in Garden City, New Jersey. The Respondent provides worldwide courier services and the parties agree that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### *A. Background*

On September 6, 1991, the Board's Regional Office conducted an election in Case 2–RC–7857 that was won by the Union. As a result, the Union was certified on October 1, 1991, as the exclusive collective-bargaining representative of all full-time and regular part-time drivers employed by the Respondent at its Long Island City, New York facility.

In addition to the present case, the Respondent has been involved in two other cases before the Board. In *TNT Skypak, Inc*., 312 NLRB 1009 (1993), the Company was found to have violated Section 8(a)(1) by interrogating employees about their union activities and by soliciting employee grievances and impliedly promising to resolve those grievances if the employees did not vote for the Union in the election described above.[1] In the second case, *TNT Skypak, Inc*., 317 NLRB 659 (1995), the Board concluded that the Company, at a different location and involving a different local of the Teamsters Union, illegally discharged employee Jose Vasquez, who is also involved in the present case.

### *B. The Negotiations*

The negotiations between the parties commenced on October 31, 1991. Thereafter, the parties met for a total of 18 times during the next 2 years. Additionally, there were numerous letters and telephone calls between the Union's chief spokesman, Robert Archer (then its attorney) and the Company's attorney and spokesman, Clifford Chaiet.

During the negotiations, the Union's negotiating team consisted of Archer, Adam Heinz, its president, Anthony Farrino its vice president, Anthony Razzi, its secretary-treasurer, plus employees Michael Yanis, Jose Vasquez, Martinez, and Iken. The Respondent was initially represented by its attorney, Clifford Chaiet, its vice president, William Deering, plus Anthony Ventiera, and Mark Lagaris. At a later point in the negotiations, Robert Newell, Respondent's in-house counsel joined the negotiations and Deering dropped out.

Apart from the introduction into evidence of documents consisting of various contract proposals made by either side and letters written from one to the other, the General Counsel had Archer testify about the negotiations and his testimony was not contradicted by the Respondent. Accordingly, while each side may argue that the facts support their legal conclusions, there is no dispute about the underlying facts in this case, at least insofar as the negotiations are concerned.

The Union sent its initial contract proposal to the Company on October 31, 1991, and Chaiet tendered the Company's first counterproposal at the second meeting held on November 13, 1991. As far as the negotiations were concerned, not much happened during the initial phase, albeit on February 25, 1992, Archer sent Chaiet a revised contract proposal.

On April 27, 1992, Archer wrote a letter to Chaiet requesting that the Company make a written economic proposal and this was done on April 30, 1992.

At the seventh meeting held on May 26, 1992, the Union argued for the superiority of its medical plan and Chaiet said that the Union's plan was "do-able." For its part, the Union said that it could work within the Company's existing wage system.

By letter dated June 9, 1992, Chaiet wrote to Archer indicating that the Company agreed "to provide its employees with medical insurance coverage through the [Union's] Group Welfare Fund," with its contributions being equal to its present cost of providing medical coverage to the employees.

On July 24, 1992, at the eighth meeting, the Union agreed to the Company's proposed starting salaries. At this point the parties were 25 cents apart on wage increases. From this point on and until August 27, 1993, the parties started to make more progress, in the sense that both sides started to drop demands and tentative agreements on various items began to be forthcoming.

According to Phil DiNardo, the Company's vice president of human resources for the Americas, there was internal discussion within the Company about what to do about lagging profitability during the summer of 1992. He states that this led to a decision, made in Amsterdam, to have a freeze in merit increases and hiring. (Since everyone in the Company was at that time, on a merit increase system, this amounted to a total freeze on all wages.)

On September 8, 1992, the Company instituted a worldwide freeze on wages and hiring. This was due to its financial situation, and according to DiNardo, the North American operations were doing worst of all.

At the 11th meeting held on October 16, 1992, Company Representative Deering said that the Respondent could not improve on its wage proposal due to the austerity program, but that it could be more flexible with respect to benefits if the Union could be more flexible about part-time employees. (The parties had discussed the balance between full-time and part-time employees with the Union wanting most employees to be full time and the Company wanting flexibility in hiring part-time employees).

On November 2, 1992, Archer sent another revised contract proposal to Chaiet and the parties met on November 24, 1992. At this meeting, the parties discussed the Respondent's implementation of the wage freeze through the end of the year and finalized language regarding medical coverage.

On December 3, 1992, Chaiet sent a letter to Archer stating that the Company would implement its own medical plan. Archer protested that this was, in his opinion, a unilateral change and a violation of the Act. Although not separately alleged as a violation of the Act, the General Counsel points to this action as "a harbinger of worse things to come."

On January 11, 1993, Chaiet, pursuant to the Union's request, sent a letter setting forth issues and indicating which were still open and which had been resolved. In this letter, Chaiet listed the settled issues as relating to holidays, subcontracting, union security, seniority, shop stewards, protection of rights, uniforms, labor practices, funeral leave, jury duty, strikes and lockouts, grievance/arbitration, application of Federal and state laws, maintenance of standards, a savings clause, and a nondiscrimination clause. He listed the open issues as

[1] The Board, however, dismissed an allegation that the Employer violated Sec. 8(a)(3) by discharging an employee because of his union activity.

being wage freeze, guaranteed hours, operations, check-off clause, health and welfare, pension plan, fringe benefit collections, pickup and deliveries, sick leave, and company rules.

On February 1, 1993, Archer wrote to Chaiet stating that the Union would accept the Company's position regarding wages, operations, holidays, seniority, check-off clause, pension, pick-up and delivery, vacations, sick leave, strikes and lockouts, company rules, attendance, and the application of Federal and state laws. Archer included with the letter, the Union's fifth revised contract proposal.

At the February 4, 1993 meeting, the Company announced that Deering was no longer involved and Chaiet said that he had authority, within guidelines, to negotiate a contract. At this meeting, the Union accepted the Company's position regarding wages but questioned the impact of the wage freeze. At this meeting, the Company asserted that a category of employees called "walkers" should be specifically excluded from the bargaining unit. At most, there was, at that time, one person who fit into this category and this was an employee who was stationed at a location in New York City and who, upon receiving packages from a TNT driver, would then deliver them to the client at its office.

On March 5, 1993, Archer sent a letter to Chaiet setting forth the Union's positions. Included in that letter was a description of the concessions that the Union was making. For example, Archer stated that the Union would accept the employer's wage proposals but that it should be amended to include an appropriate wage rate for "walkers." He also stated that the Union would accept the Company's proposed language permitting a wage freeze in the event that there was a future companywide freeze, if the Company provided satisfactory documentation of the fact. As to section 2, hours, Archer stated that the Union would agree to the Company's proposal for overtime at 1–1/2 rate for work done after 40 hours in a 7-day week. He also agreed to delete the Union's demand that no more than 49 percent of the work force be part-timers in consideration for the fact that the employer had agreed to put a 25-hour-per-week cap on part-time employees and had also agreed to language stating that it would not use part-timers to circumvent full-time employees. Archer also accepted the Company's proposal that there be a 401(k) plan instead of the Union's requested pension plan. (These were some but not all of the concessions made by the Union in Archer's March 5, 1993 letter.)

A followup letter was sent by Archer to Chaiet on April 8, 1993, further clarifying the Union's position on several open issues. Among other things, Archer complained that the employer had reneged on its previous agreement to participate in the Union's welfare plan and complained that Chaiet had not yet sent him information which had previously been requested.

On April 12, 1993, Chaiet responded to Archer's April 8 letter and stated:

> As to your assertion that the Employer had previously agreed to participate in the Union's Welfare Plan, it would appear, from my review of the written proposals and correspondence . . . that such an agreement was not formally reached. This point was reiterated in my letter to you of December 10, 1992 where I further noted the fact that both parties had reserved the right to modify, amend, add to or subtract from their proposals.
>
> I have reviewed your position vis a vis the open items with my client. In order to assist in the resolution of these items, I would make the following points:
>
> *Section 1 Wages.* The Union's counter-proposal regarding the walkers is totally unacceptable. I would remind you that at the February 4th session you indicated that the Union had language in other contracts pertaining to this classification of employee and that said language would be presented for review by the Employer. I have yet to receive the language proposal discussed. Alternatively, you might want to discuss excluding the walker classification from coverage under the contract.
>
> *Section 2 Hours.* You correctly note that an open issue exists on the question of consecutive days off and the right of the Employer to institute a 4-day 10-hour day work schedule. I would ask you to further note, regarding the use of part-time employees, that the employer agreed not to regularly utilize part-time employees more than 25 hours per week. The point being that the Employer did not agree to an absolute cap on hours so as to subject itself to grievances each and every time a part-time employee exceeded 25 hours in a given week.
>
> *Section 3 Operations Covered.* Long Island City employees do not, to my knowledge, regularly make deliveries to the Bronx, Westchester or Connecticut. They do, however, perform a limited amount of work in New Jersey. The Employer's position, however, is not affected by these de minimus excursions outside the 4 boroughs serviced by Long Island City. As to your question about Newark, I would suggest that the answer will depend upon the circumstances of such a move. Variables such as the number of employees transferred and the size of the resulting unit raise issues best resolved by the N.L.R.B.
>
> *Section 4 Holidays.* You have correctly stated that the Employer will not provide holidays to part-time employees.
>
> *Section 12 Health & Welfare.* My earlier comments deal with the status of this proposal. I have, pursuant to your request, appended hereto information concerning the Employer's present plan.
>
> *Section 17. Vacation.* The Employer has, in the past, paid vacation moneys to employees in advance of the actual vacation. As to your comment about pro-rating vacation, I would ask that you clarify this. Finally, please be advised that the Employer does not now, and is not planning to, provide part-time employees with vacation benefits.
>
> *Section 19 Sick Leave*. The Union's counter-proposal is unacceptable. Part-time employees do not presently enjoy vacation or sick leave benefits and the Employer has not agreed to, nor will it agree to provide sick benefits.
>
> *Management Rights.* The Employer has not modified its proposed language regarding this provision. The Union's counter-proposal is unacceptable.

On May 24, 1993, Chaiet sent another letter to Archer. Chaiet proposed, among other things, language regarding implementation of future wage freezes, pay rates for "walkers," a provision allowing it to utilize a 4-day, 10-hour day work schedule and a modification of section 2 (hours), to the effect that the Company would not regularly use part-time employees more than 25 hours per week. As to medical insurance and its proposed management-rights clauses, Chaiet wrote:

*Section 12 Health & Welfare*
*Modify*

(A) The Employer agrees to provide its regular full-time employees with medical insurance coverage under its own plan and under the same conditions as said coverage is provided all other similarly situated employees on a company-wide basis. The Employer further agrees to provide the Union with information concerning any changes or modifications the presently existing plans before implementing same.

*Section Management Rights*
*ADD* the language in paragraph 1 of the Employer's original written proposal except delete "to promulgate, implement and enforce work rules which in the Employer's sole discretion are necessary and reasonable for the orderly, efficient and profitable operation of its business; formulate and implement bonus and incentive programs aimed at increasing or rewarding productivity, efficiency and/or attendance."

At the 16th bargaining session held on May 26, the Union made further concessions. Among these were acceptance of the Company's wage freeze language, acceptance of the Company's proposed management-rights clause (as modified in the May 24 letter), agreement to allow the Company to institute a 4–day week for some or all of the employees at the Company's discretion; and agreement to the Company's health plan for the first year of any contract. (The Union proposed a reopener after the first year to discuss health insurance). Given the Union's concessions at this and prior meetings and the prior agreements made by the parties on numerous other items, Archer asked Chaiet to send him a letter listing the open issues and what the Company's position was on them.

Chaiet did so on June 29, 1993, when he wrote:

> I am writing to confirm the postponement of our negotiation session scheduled for July 1, 1993 and to respond to those items left open after our last session on May 26, 1993.
>
> The first issue concerned the effect of a companywide wage freeze upon the timing of subsequent increases. The Employer has taken the position, as expressed in my language proposal of May 24, 1993, that subsequent increases will be pushed back for a period of time equal to the length of the freeze if a similar delay is imposed companywide. The position expressed in that letter has not changed.
>
> The second issue involved the[2] use of "walkers." The Union proposed a $7.75 per hour rate and rejected the Employer's proposal as set forth in my May 24th letter. The Employer rejects the Union's proposal and stands by the proposal contained in my May 24th letter.[3] Further, it is the Employer's position that walkers will not receive benefits.
>
> The third open issue involved Section 3 Operations Covered. The language proposed . . . on May 24th stands as a statement of the Employer's position.[4]
>
> Finally, with regard to adding a reopener for the purpose of discussing the Union's Health Plan, the Employer will not agree to include such language in the agreement.
>
> I hope this clarifies the Employer's position regarding the open issues.

On July 20, 1993, Chaiet sent a letter asking Archer, to prepare a draft contract incorporating the employer's most recent language proposals.

On August 2, 1993, Archer sent such a draft to Chaiet. For the most part, this draft incorporated all of the prior agreements between the parties, left out all contract proposals withdrawn by the Union[5] and for the most part incorporated, where accepted by the Union, all company language proposals. Thus, in relation to Chaiet's letter of June 29, 1993, Archer's draft, except for walkers, accepted the Company's proposed revision of section 1, wages, including the Company's language for wage freezes. He also accepted the Company's language on section 3, operations covered. Finally, he essentially agreed to the Company's health plan and dropped the Union's demand that the contract contain a reopener allowing the parties to negotiate on this issue. As to the walker issue raised by Chaiet in his June 29 letter, although Archer agreed to exclude walkers from the wage rates and wage increases effecting the other unit employees and also agreed that any walkers hired by the Company would not get any contractual fringe benefits, he counterproposed that walkers get a starting rate of $6 per hour. He also rejected the Company's proposal that *if* it decided to use walkers more extensively and *if* that use caused layoff of bargaining unit employees, such employees would be given the right to move to walker jobs at walker rates.[6]

In addition, Archer in his draft agreement made a small number of counterproposals. For example, in section 2, he continued to press for a guaranteed workweek of 5 consecutive days and 40 hours per week with overtime at time and a half for hours over 40 and on a 6th day and at double time for a 7th consecutive day worked. At section 13(A), although accepting the Company's existing medical plan, Archer proposed that any additional costs to the employees would have to be negotiated prior to implementation. This differed from the Employer's May 24, 1993 proposal requiring only that the Employer give

[2] As noted above, the Union and the Company had already agreed on nearly all of sec. 1 of the proposed contact dealing with wages. They had agreed on the starting wage rates and on the amount of increases. Moreover, the Union had already accepted the idea that the Company would have the right to freeze wages under the contract in the event that there was a companywide freeze. The parties had not agreed on the wages for "walkers" but this was to a large extent a nonissue as there was at most one person who did this type of work.

[3] In his May 24 letter, Chaiet proposed that if the Employer modified its operations to make more extensive use of walkers in its pick-up and delivery operations, they would be hired at a minimum rate of $4.25 per hour, that they would receive a 25-cents-per-hour increase after their probationary period and receive further raises of 25 cents per hour per year. Chaiet also proposed that if the use of walkers resulted in a reduction in the drivers bargaining unit those people facing layoff would be offered the opportunity to work as walkers at walker rates of pay.

[4] In his May 24 letter, Chaiet proposed to modify sec. 3 of the proposed contract to read at C "in the event the Employer transfers its operations to Manhattan, Brooklyn, Staten Island, or any other facility in Queens, the present employees and present contract shall prevail at the new terminal(s) or locations(s)."

[5] For example, this draft agreement omits and withdraws what had previously been a proposed sec. 14, fringe benefit collections.

[6] As there was at most, one person who might have been classified as a walker and the question of whether the Company would hire walkers in the future was speculative at best, the bargaining over this issue, strikes me as being a hopeless waste of time and its introduction by the Employer as a diversion.

information to the Union regarding any changes in the plan. At section 17, Archer made some minor modifications in the vacation clause, in part to provide that vacation pay would be determined by an employee's weekly rate including premium and night-shift differentials. At section, 23, although Archer essentially agreed to incorporate the existing company rules into the contract, he proposed that any disputes concerning the reasonableness of rule changes should be subject to the grievance procedure.

To summarize, what is readily apparent from Archer's draft contract of August 2, 1993, is that the Union was, in effect, throwing in the towel and conceding virtually every important point in the Employer's favor. The rejection of the Company's "walker" proposals were essentially meaningless as there was, at the time, either no one or at most one person who might have fallen into that category and the possible hire of other walkers was a matter of mere conjecture. To the extent that the Union made even the most modest counterproposals, one might say that these were put forward like a fig leaf to cover the fact that in all significant respects, the Union had announced its surrender. On August 3, 1993, Chaiet wrote to Archer acknowledging receipt of the latter's draft contract. On August 5, 1993, Chaiet wrote to Archer suggesting that the next meeting take place on August 23.

The meeting scheduled for August 23 was postponed and on August 27, 1993, Chaiet sent the following letter to Archer. As this is alleged to be the crux of the bad–faith bargaining allegation, it is quoted with my commentary (indicated by the word note**)**, as follows:

> Dear Bob,
>
> Since these negotiations began in October 1991, the Employer has experienced a number of significant changes in its management structure. As these changes have occurred, the Employer has reassessed its position vis a vis the negotiations on a number of occasions, and has modified its proposals to deal with changed goals and circumstances.
>
> A similar reassessment occurred after we received your most recent draft of the Drivers Agreement. As a result I have appended hereto a summary of the Employer's position with regard to each and every provision of the Agreement.
>
> SUMMARY OF POSITION[7]
>
> *Section*
> *[Wages]*
> 1(A) The starting minimum for walkers should be $4.25 per hour.
> Delete the last sentence beginning with "After the probationary period."
> (B) Delete entirely and substitute language allowing merit increases based upon individual performance review.
> (C) Delete entirely.
> (D) Accepted.

Note: This proposal reneges on the specified wage increases that had previously been agreed to including the prior agreement to give employees periodic raises of 25 cents until they reach the rate of $12.50. The Company's proposal to substitute a merit increase system, in effect, places the negotiations regarding wages back to their commencement when the Company essentially proposed continuance of its existing merit increase system.

> [*Hours*]
> 2(A) Delete provision for double time on seventh day. Delete provision for 8 hour guarantee for 6th and 7th days. Substitute 4 hour guarantee at time and one half rate if employee exceed 40 hours of work in week. Add language allowing the Employer to assign overtime work to available employees in the facility or at work when need arises.
> Note that the "two consecutive days off" language applies only to 4 day scheduling.
> (B) Accepted.
> (C) Accepted.
>
> [*Operations Covered*]
> 3(A) Accepted.
> (B) Accepted
> (C) Delete from "or transfers work currently performed" to "New York Metropolitan Area."
>
> [*Holidays*]
> 4(A) Delete "walkers" from eligibility.
> (B) Provide for eligibility for floating holidays to be after 90 days, not one year. Clarify that unused floating holidays will not be paid for.
> (C) Accepted
> (D) Accepted
> (E) Accepted
>
> [*Subcontracting*].
> 5. Delete entirely. Substitute language allowing Employer to subcontract when in its sole discretion, the Employer determines subcontracting will be economically or operationally more efficient.

Note: The Company's proposed subcontracting clause reneges on a previous agreement whereby the Union had acceded to the Employer's counterproposal on subcontracting language. Under the previously agreed–upon language, the Employer retained the right to subcontract to the extent that it had normally done so in the past, but it agreed that it would not otherwise contract out unit work for the sole purpose of avoiding the contract's terms.

> [Union security provision]
> 6(A) Accepted.
> (B) Accepted
> (C) Delete entirely
> (D) Delete entirely and substitute language allowing Employer to utilize supervisors to perform bargaining unit work when the Employer determines such utilization is economically or operationally more efficient.

Note: The Employer's proposal here constitutes a reneging on the previous agreement which, to a limited degree restricted the Employer from using supervisors to do bargaining unit work where their utilization would result in a permanent diminution in the size of the bargaining unit.

> [Seniority]

[7] The numbering in Chaiet's August 27, 1993 draft corresponds to the numbering in the draft contract that was sent by Archer on August 2, 1993. It should be noted that in Archer's draft, he eliminated what had previously been "Section 14: Fringe Benefits Collections." Therefore the paragraphs numbered from 14 on are different from the numbering in previous draft contracts.

7(A) Delete last sentence of second full paragraph, beginning "It is understood . . ." Substitute language allowing the Employer to determine, in its sole discretion, the use of full-time and part time employees it will utilize.
(B) Accepted
(C) Accepted
(D) Accepted
(E) Accepted

Note: The Employer's proposal regarding seniority constitutes a reneging on the previous agreement that when a layoff is required, part-time employees would be laid off before full–time employees.

[Checkoff]
8. Accepted

[*Stewards*]
9. Delete from last sentence of third full paragraph "productivity not being a factor in this area."

Note: The Employer's proposal regarding section 9, constitutes a reneging of the previous agreement that shop stewards would have superseniority and would be the last laid off provided that the person could perform the job irrespective of his productivity.

[*Protection of Rights*]
10. Accepted

[*Uniforms*]
11. Accepted

[*Health & Welfare*]
12(A) Delete from last sentence "and further agrees...prior to termination."
(B) Delete the last sentence.

[*Pensions*]
13(A) Add " This shall not be construed as a guarantee that said Plan will continue to exist or that it will not be modified, amended or altered. Any such changes as are implemented in said Plan as it applies to non-union employees shall be effective as to the employees covered by this Agreement.''

Note: After dropping its own demands for the union pension plan and agreeing to have the Company's 401(k) plan substituted, the language now proposed by the employer gives it an absolute right to modify, change or discontinue the plan at its sole discretion at any time during the life of the contract.

[*Pick-Ups and Deliveries*]
14(B) Delete the last sentence. Substitute "Employees are expected to perform their duties."

[*Labor practices*]
15 (A) Accepted
(B) Accepted
(C) Accepted
(D) Accepted
(E) Accepted
(F) Accepted
(G) Accepted
(H) Accepted
(I) Accepted
(J) Accepted
(K) Accepted
(L) Delete
(M) Accepted.

Note: The Employer's proposal regarding section 15, although a relatively minor change, is nevertheless a reneging on subsection (L) which required removal of communications and/or letters from an employee's personnel file after 12 months.

[*Vacations*]
16(A) Delete "Walkers"
Provide for vacation time to be accrued on a monthly basis.
(B) Update
(C) Accepted
(D) Accepted
(E) Accepted
(F) Accepted
(I) Accepted
(J) Accepted
(L) Accepted
(G) Add "unless the employee changes the selected vacation period in which case the Employer will provide vacation pay before the vacation begins if the employee provided one month advance notice of new vacation dates."
(H) Delete "including premium shift and night shift differential pay."

[*Funeral Leave*]
17 Accepted

[*Sick Leave*]
18. Delete entirely and substitute the following:.... (details omitted).

Note: The Employer's August 27, 1993 proposal reneges on details that had previously been agreed upon and proposes to substitute an entirely new sick leave provision.

[*Jury Duty*]
19. Accepted

[*No strikes & lockouts and grievance procedure*]
20. Accepted

[*Federal & State law*]
21 (A) accepted
(B) Delete the last full paragraph.
(C) Add to last sentence "unless such refusal is determined by the Employer to be unjustified."
(D) Accepted
(E) Accepted

Note: The Employer's position here amounts to a reneging on at least one point which was the employer's prior agreement to return the body of an employee killed during the course of his employment and while away from his terminal.

[*Armed Forces*]
22. Accepted.

[*Company Rules*]
23. Move comma from after "Employer rule" to after "Appendix A."

[*Maintenance of Standards]*
24. Add "unless specifically modified, amend or otherwise changed herein."

[*Savings Clause*]
25. Accepted.

[*Non Discrimination*]

26. Accepted.

[*Management Rights*]
27. Accepted.

[*Duration*]
28. Accepted.

Appendix.
A(II)(A)(2) Delete last sentence beginning with "Discipline issued under this section."
A(II)(B) Add "10. Failure to maintain acceptable level of productivity."

Note: By its August 27 modifications of the appendix that sets forth company rules, the Company is, in effect, making these rules more burdensome on the employees than what had previously been agreed to by the Union.

MISCELLANEOUS
Add section providing for application of Employer's policy concerning the Family and Medical Leave Act.
Add section providing for application of Employer's anti-nepotism policy.

On August 31, 1993, Archer telephoned Chaiet and charged that the Respondent was not bargaining in good faith. Archer's unrefuted testimony was that Chaiet responded; "This wasn't my idea to submit this proposal. I was just following orders."

The parties met for the 17th time on October 19, 1993. At this meeting, Archer, after calming down his side, asked Chaiet what was going on. He states that Chaiet said that he could only offer the Long Island City employees the same package as nonbargaining unit employees. Archer states that Chaiet said that Deering did not have authority to make agreements; that he (Chaiet), now had different masters with different instructions and that the latest proposals conformed to the Company's initial proposals. Archer testified that when he asserted that this constituted an unfair labor practice, Chaiet responded with a shrug and said, "what do you want me to say?" Archer states that Chaiet said that the Company had problems with other locals and that the Company had nothing further to say or propose. According to Archer, Chaiet offered no financial or any other justification for the changes made by Chaiet's August 27 letter.

The final meeting was held on November 19, 1993. At this meeting the Union reported that the Company's last proposal of August 27 was not acceptable. When the Union asked if mediation would be useful, Chaiet said that there was nothing that the Employer would add; that the Company would only give unit employees the same package as nonunit employees, except for a union-security clause and a grievance-arbitration clause.

The Respondent asserts that the change in the Company's positions reflected in Chaiet's August 27, 1993 letter came about as a result of (a) ongoing adverse economic conditions within the Company, and particularly its North American Operations, and (b) changes in management personnel. The Respondent asserts that the foregoing factors resulted in a reconsideration of the Company's bargaining posture. "*I don't believe it*.''

There does not seem to be any dispute that the Company as a whole and its North American operations was facing a constant economic drain resulting from competition from companies such as Federal Express etc. (TNT's marketing strength, according to Phil DiNardo, its vice president of human resources, is in Europe and Asia. According to his testimony, TNT's USA operations are to some extent a loss leader service for the Company's European and Asian customers). There is also no dispute over the fact that in the late summer of 1992, the Company decided to have a 1-year wage and hiring freeze. Such a freeze was implemented on a worldwide basis on September 8, 1992. In dealing with this freeze and the possibility that there might be other freezes in the future, the Company through Chaiet demanded and received from the union an agreement that future wage freezes could be implemented by the Company during the life of the collective-bargaining agreement.

There is also no question but that there were some changes in the Company's management. For example, Deering was replaced as a negotiator with Newell. Also Tom Cox replaced John Ovens as the chief executive officer of the Company's Americas' operations. Chaiet, however, remained as the Company's chief spokesman and nothing said by him *or anyone else in the Company*, suggested that Chaiet did not have authority to negotiate or the authority to make commitments (even if they were commitments conditioned upon an overall agreement), during the bargaining. Prior to August 27, 1993, nothing was said to the Union by Chaiet or anyone else in the Company which even hinted that the numerous tentative agreements that had been forged during the preceding 18 months were in jeopardy or were being reconsidered.

DiNardo testified that the initial freeze was suppose to end in September or October of 1993. He testified that he received reports about the negotiations from Newell and Costanza and that he reported to Tom Cox. DiNardo testified that sometime during the summer (at some unspecified time), Cox, told him that Cox had gotten direction from John Fellows, TNT's worldwide CEO, not to give special consideration to any group of employees. (There is, however, nothing in writing to support this hearsay assertion). According to the Respondent's Brief, Fellows determined that the wage freeze would not be lifted in North America. But DiNardo's testimony indicated that although there was discussion and argument between Cox and Fellows during the summer of 1993 about whether to retain the wage freeze for North America (to which he was a bystander), DiNardo also testified that the final decision on this was made in Amsterdam in September 1993. (In other words, *after* Chaiet's August 27 letter.).

In any event, even assuming that the Company was considering extending the freeze past September 1993, I fail to see how this, by itself, justified such a drastic shift in the Company's bargaining posture vis-a-vis the Union, particularly as the contingency for a wage freeze had already been built into the prospective contract by virtue of a concession on the Union's part. Moreover, assuming that the Compan*y* was still in financial distress, there is no evidence that things were significantly worse than what they had been from the outset of the negotiations. So what's new? Everybody involved seems to have recognized from the outset that the Company was having financial difficulty and this was reflected in the concessions that the Union made during negotiations.

In my opinion the only significant *new* event occurring prior to Chaiet's August 27 letter, was that there was, from the Company's point of view, a danger that the Union would make sufficient concessions so that agreement on a contract would become inevitable. Thus, Chaiet's June 29 letter made it clear that there was, from his bargaining perspective, only four open items. And the Union's proposed contract draft dated August 2, although raising a few minor issues, essentially accepted the

Company's demands. Assuming that the negotiations had continued on that track, it seems to me that no "reasonable person" could doubt that a collective-bargaining agreement would have been reached within a matter of days.

On March 17, 1994, employee Mark Shults filed a decertification petition in Case 29–RD–762. This petition was dismissed, subject to reinstatement, by the Regional Director on March 30, 1994, on the grounds that there were pending unresolved unfair labor practices. At about the time that Shults filed the decertification petition, a petition signed by 22 of the unit employees was tendered to the Company. This petition stated; "We, the employees of TNT Express Worldwide, no longer wish to be represented by Local 851.''

On January 19, 1995, the Union by its new attorney, Kyle Flaherty, wrote to the Company, offering to resume negotiations. On January 25, 1995, the Company's attorney, Newell responded and stated, "until the issue of Local 851's status as representative of TNT's Long Island City drivers is resolved, it would be inappropriate to resume bargaining over a contract."

*C. Discussion Relating to the Bargaining and the Withdrawal of Recognition*

The crux of the General Counsel's contention, it seems to me, is the fact that on August 27, 1993, after an extended period of negotiations, the Employer reneged, in a significant and substantial way on many previous tentative agreements. The General Counsel and the Charging Party assert that the effect of this conduct, was to negate the negotiations that had gone on until that date and that the Respondent was motivated by its desire to avoid consummating an agreement just when an agreement was likely. They also argue that the Respondent's antiunion animus is demonstrated by virtue of the earlier decisions of the Board reported at 312 NLRB 1009 (1993), and 317 NLRB 659 (1995).

In *Atlanta Hilton & Tower*, 271 NLRB 1600 (1994), the Board stated:

> Under Section 8(d) of the Act, an employer and its employees' representatives are mutually required to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession."
>
> . . . .
>
> Although an adamant insistence on a bargaining position is not of itself a refusal to bargain in good faith, . . . other conduct has been held to be indicative of a lack of good faith. Such conduct includes delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meetings.

In determining whether a party had bargained in good faith or bad, the Board looks to the totality of the circumstances. *Overnite Transportation Co*., 296 NLRB 669 (1989), enfd. 938 F.2d 815 (7th Cir. 1991). Moreover, the burden of proof rests with the General Counsel. See *Altamil Corp*., 227 NLRB 770, 790 (1993), and *Weather Tec Corp.*, 238 NLRB 1535, 1561–1562 (1978). As stated by the administrative law judge in *Weather Tec Corp.*:

> General Counsel's burden of proof in these cases requires more than raising mere doubts or suspicious as to the Company's motives. Here General Counsel is unaided by independent evidence of hostility on the part of the Respondent to the Union, of unreasonable counterproposals that were illegal in their very nature or so indefensible or lacking in rationality as to warrant inferring bad faith, *or of the Company's reneging on matters already agreed to on proposals it had advanced*. [Emphasis added.]

Absent full agreement on a full collective–bargaining agreement, either party to the negotiations may add to, alter, modify ,or delete previously made tentative agreements. However, this rule is qualified by a requirement that such changes may not be motivated by intent to forestall the making of a contract.

In *Hickinbotham Bros. Ltd.,* 254 NLRB 96, 102–103 (1981), the administrative law judge stated:

> [A]s to the allegation that Respondent has violated Section 8(a)(5) of the Act by making regressive bargaining proposals, Respondent and the Union agreed at the first negotiating session that agreement on individual provisions were not binding until agreement had been reached on a collective bargaining agreement as a whole. . . .
>
> Here Respondent had made a number of concessions . . . in order to avoid a strike. It was unsuccessful in this regard and a strike commenced. Nevertheless, these prestrike proposals remained outstanding for a month after the strike commenced. By November 14, it was apparent to Respondent that it could weather the strike. With this realization of its economic strength, it dropped some of the proposals it had made in an effort to avoid a strike. It is not illegal for an employer who has weathered a strike to capitalize upon its new found strength to secure contract terms it desires . . .

In *Merrell M. Williams,* 279 NLRB 82, 83 (1986), the Board dismissed the complaint alleging bad-faith bargaining and stated:

> This case presents the question of whether the repudiation of tentative agreements reached in the course of collective bargaining, standing alone, constitutes bad faith
>
> . . . .
>
> Unlike the refusal to execute an agreed-upon contract, which is a per se violation of Sections 8(a)(5) and (1) of the Act because it demonstrates a refusal to acknowledge and abide by the fruits of bargaining, the withdrawal of tentative agreements reached prior to the formation of a legally enforceable contract represents only one factor to be considered in determining good or bad-faith bargaining. In ruling on an allegation that a party has failed to bargain in good faith, it is well established that we look to the totality of circumstances reflecting the party's bargaining frame of mind.
>
> In this case, the Respondent's negotiator made an offer . . . believing he had the authority to do so. When it became clear that the Respondent would not approve the proposals, the negotiator immediately withdrew from the agreements, offering a reason for so doing and further offered to immediately resume bargaining. The Union, which had not yet submitted the proposal to membership for ratification or taken any action in reliance on the parties' tentative agreement refused to bargain further. The

> Respondent's explanation for its retraction of its prior agreement regarding the two provisions constitutes sufficient good cause to rebut any inference of bad faith arguably arising from that action. Further, the Respondent offered to substantiate its explanation by opening its books to the Union and to resume bargaining in an effort to reach agreement.

In *Barclay Caterers,* 308 NLRB 1038 (1992), the Board held that absent full agreement, either party is free to withdraw from tentative proposals as long as withdrawal is not motivated by an intent to frustrate bargaining or prevent an agreement. The Board stated:

> The General Counsel cites two cases as authority. In *Natico, Inc*., 302 NLRB 668 (1991), the agreement in question was not a tentative agreement on one term of a multiterm contract that was being negotiated, as here.... Without any valid basis, the Respondent reneged and refused to participate in arranging the referendum by employees, as it had agreed. . . . Similarly, in *Arrow Sash & Door Co*., 281 NLRB 1108 (1986), . . . the employer reneged on a series of tentative agreements, without giving any valid reason. The Board found a violation because the employer's pattern of reneging constituted a tactic to stultify bargaining altogether. Here, there was only one act of reneging on a tentative agreement; not a pattern of such conduct. Moreover, Respondent did give a reason—it did not wish to pay such benefits to part-time employees. . . . Therefore, this case is similar to one that the Board distinguished in *Arrow*; *Merrell M. Williams*, 279 NLRB 82 (1986). *Merrell M. William's* involved, as here, a withdrawal from a single tentative agreement.

In *Arrow Sash & Door Co*., 281 NLRB 1108 (1986), the Board, with Chairman Dotson dissenting, stated at footnote 3,

> The Respondent here has failed to demonstrate that it had good cause for withdrawing from the tentative agreements reached and the concessions made during its prior bargaining sessions with the Unions. The Respondent asserts that it withdrew its concessions and the tentative agreements because it believed that the Unions had sanctioned or condoned a "sick-out" . . . and had, therefore breached the no-strike provision of their agreement, thereby allowing it to withdraw its concessions and from the tentative agreements. . . However, as the judge correctly found, the evidence . . . fails to establish the Union's either sanctioned, condoned or in any way encouraged the . . . employees to engage in a "sick-out." Thus, despite apparent progress in negotiations toward a new agreement, the Respondent not only withdrew from all tentative agreements and concessions of the extension of the existing contract; cancellation of the next scheduled bargaining session; unilateral cessation of payments to the pension and health funds, and unilateral implementation of a new health plan. Such conduct as a response to the employee sick-out went far beyond the grounds relied on in *Farm Boy* for justifying that employer's action.

As stated above it is my opinion that when TNT, on August 27, 1993, reneged on the previously made tentative agreements, it did so because it became apparent that the Union was about to accept virtually all of the Company's positions thereby making a contract inevitable. In my opinion this conduct was motivated by a desire to avoid reaching any agreement at all and I conclude that that the Respondent engaged in bad-faith bargaining in violation of Section 8(a)(5) and (1) of the Act.

Inasmuch as I have concluded that the Employer bargained in bad faith, it follows that the Company may not assert a good-faith doubt as to the Union's presumed majority status and may not withdraw recognition. Thus, in *Barclay Caterers*, supra at 1025 fn. 2, the Board stated:

> [T]he Respondent failed to demonstrate that it had a good-faith doubt based on objective considerations of the Union's continued majority status. The Respondent cited its current lack of a collective-bargaining agreement . . . ; the employee turnover in the unit since the expiration of the contract . . .; the decertification petition filed for the unit . . . ; and the Union's failure to produce documentary evidence of its majority status at the hearing.
>
> None of these factors, individually or in total, establishes sufficient objective considerations . . . The absence of a current collective-bargaining agreement merely means that the contract is not a bar and that the issue of majority status may be raised. It does not show that majority status has been lost. Further employee turnover, by itself, cannot be used as a basis for belief that a union has lost majority support since it is presumed that in the absence of evidence that would justify a contrary conclusion, new employees will support the union in the same ratio as those whom they have replaced. Moreover, this is particularly true when high turnover is prevalent in the industry involved. . . . Similarly without a showing that a majority of employees supported it, the decertification petition by itself, cannot justly the Respondent' withdrawal of recognition. . . . Nor does the Union's failure to produce documentary evidence of majority support show loss of that support. The Union was not required to carry the Respondent's burden on the issue of good-faith. In addition, even were some of the documentary evidence available, it would not necessarily have the evidentiary value the Respondent appears to urge. The Board has long held that majority support for a union is not to be, for example, confused with majority union membership.
>
> Finally, not only has the Respondent failed to meet its burden on showing that its asserted good-faith doubt . . . was based on objective considerations, it also raised that doubt while engaging in unfair labor practices. It is axiomatic that a defense of good-faith doubt about a union's majority status may only be raised in a context free of unfair labor practices. [Citations omitted.]

*D. Alleged Changes in Vacation Policy*

There is no dispute about the fact that prior to 1994, the Company had a policy whereby the employees were asked, in order of seniority, what their vacation preferences were. In accordance with this policy, John Carreto, the facility's duty operations manager, announced in late December 1993 that the employees would be called into his office to make their picks. He testified, however, that he thereafter received orders from his superior, Pete Gagliano, the operations manager of TNT's Eastern U.S.A. region, to hold off on vacation selections. Carreto testified that he was not told why. As a consequence, it was shown and the Respondent *concedes* that for 1994, vacations were not scheduled in accordance with seniority preference as had been the case in the past. Gagliano did not testify

in this proceeding and therefore did not offer any explanation as to why this change was required, desired, or implemented.

Moreover, union witnesses Michael Yanis and Jose Vasquez testified that people like Shults, Aramis, and Diaz, employees who were openly opposed to the Union, received their choice of vacations ahead of employees with higher seniority.

The decision to not follow past practice in 1994 was made without prior notice to the Union. Moreover, no effort was made by the Company to bargain with the Union about this decision or its implementation. The Respondent argues that this change was not significant or substantial and did not affect any employee in terms of their pocket book. I do not agree. Vacations and the selections method by which vacation selections are made is a condition of employment and therefore is a mandatory subject of bargaining. Although it may not seem that much to management and may not have resulted in lost pay, the choice of vacations is to my mind a significant matter for employee.

Further, given my conclusion that the Company has engaged in bad-faith bargaining, the prior Board decisions holding that the Company violated the Act in other respects (showing a proclivity to engage in antiunion activity), and the evidence that employees who were opposed to the Union were given preferential treatment in selecting their vacations during 1994, I conclude that this change in policy was carried out with a discriminatory motive. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Accordingly based on all of the above, I find that the Respondent violated Section 8(a)(1), (3), and (5) in this respect.

*E. No Access & No Talking Rules*

The General Counsel contends that in November 1994, the Company promulgated a rule prohibiting employees from entering the facility more than 10 minutes before their starting times.[8] She also alleges that in February 1994, the Company promulgated a rule prohibiting its employees from talking to each other while at the facility. She contends that these rules were promulgated with the intention of preventing union discussion amongst the employees and that they were enforced in a discriminatory manner against union supporters. Although alleged as violations of Section 8(a)(1) and (3) of the Act, this is not alleged as a violation of Section 8(a)(5) of the Act.

(1) No talking rule

Union witnesses Yanis and Vasquez testified about a single occasion in March 1994, when they were told by Supervisor Noonan that they were not supposed to be talking to each other while working. Neither was disciplined for this incident.

The Company's witness testified that it always had a rule prohibiting employees from talking in the work area during work time and that it applied this rule uniformly to all of its employees when appropriate.

In my opinion, the evidence proffered by the General Counsel's witnesses is insufficient to establish that such a rule was either unlawful or that it was discriminatorily enforced.

(2) No access rule

According to Supervisor Bill Doyle, in November 1994, Gagliano told him and another supervisor, Sandra Brown, to announce to the employees that there was a new rule which precluded employees from entering the facility more than 10 minutes before their starting times. Doyle explained that the purpose of the new rule was to prevent entering employees, who were not yet on the clock, from interfering with the work of those already at the facility.

The Union's witnesses testified that prior to this rule, employees were permitted to enter the facility before their start times where they could get out of the cold, could talk to each other and on occasion, hold union meetings on the premises before work. Employees were not paid for this time and no contention was made that the new rule was implemented to avoid Fair Labor Standards Act problems.

As in the case of the vacation issue, the Union's witnesses testified that some of the antiunion employees were allowed to enter the facility before their scheduled start times thereby evidencing a discriminatory application of the rule. On the other hand, Doyle testified that he enforced the rule against Mark Shults, Victor Morales, and Stephen De Valle, all of whom were against the Union.

Although Doyle testified that the purpose of the no access rule was to prevent incoming employees from interfering with the work being done by employees who already had started work, this testimony was not compelling. In this regard, there was evidence that there was a driver's room where employees who were not yet on the clock, or who were on breaks, could congregate away from the work area. Also undermining this argument was Doyle's concession that there was no such rule at the Company's JFK facility or, to his knowledge, anywhere else in the country. (At this time, the Long Island facility was the only U.S.A. facility where the employees had union representation).

In my opinion, the no access rule was put into effect with the intention of inhibiting union discussion amongst employees at the Long Island facility during their nonworktime. While it could be argued that the Company could have promulgated a no-solicitation rule that would have precluded its employees from engaging in solicitation during worktime and in work areas, the rule here had the foreseeable effect of preventing employees from utilizing nonwork areas (the driver's room), on their nonwork times from discussion of the Union or other matters relating to their terms and conditions of employment. In my opinion, this rule, although not literally worded as a no-solicitation rule, nevertheless amounted to an overly broad no-solicitation rule and violated Section 8(a)(1) of the Act. *Our Way, Inc.,* 268 NLRB 394 (1984); *Southwest Gas Corp.*, 283 NLRB 543 (1987); *Marathon Letourneau Co. v. NLRB,* 699 F.2d 248 (5th Cir. 1983).[9] Further, in *Nashville Plastic Products*, 313 NLRB 462 (1983), the Board held that an employer violated Section 8(a)(1) of the Act by prohibiting off duty employees from engaging in union solicitation and distribution of union literature on company property, during nonwork time in nonwork areas. The Board stated:

[8] She contends that in the case of Jose Vasquez, he was told that he could not enter the premises more than 5 minutes before his start time.

[9] In accordance with *Our Way, Inc*., supra, a prohibition on solicitations in the workplace on "work time" would be presumptively legal whereas such a prohibition during "work hours," would be presumptively illegal. Further, even where a rule is presumptively valid, such a prohibition will violate the Act where it is directed only against union solicitations and applied in a discriminatory fashion. *Southwest Gas Corp*., supra; *Marathon Letourneau Co. v. NLRB,* supra; *Lawson Co*., supra.

> Furthermore, an off-duty employee seeking access to his employer's property to distribute union handbills, unlike a non employee union organizer, falls within the scope of Supreme Court decisions protecting work-place organizing activities. Thus in *Beth Israel Hospital v. NLRB* 437 U.S. 483, 491 (1978), the Court stated that "the right of employees to self-organize and bargain collectively established by Section 7 . . . necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite." And in *Eastex, Inc. v. NLRB,* 437 U.S. 556, 574 (1978), the Court upheld the Board's view that the workplace "is a particularly appropriate place for the distribution of Section 7 material, because it "is the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life.'' (Quoting *Gale Products*, 142 NLRB 1246, 1249 (1963).)

Notwithstanding the above conclusion that the implementation of this new rule violated Section 8(a)(1) of the Act, I think that the evidence showing discriminatory enforcement of the access rule was too sketchy and ambiguous to support a finding that the Company violated Section 8(a)(3) of the Act in this respect.

### *F. Alleged Promise of Benefits*

Julio Cancel testified that on February 24, 1994, he became involved in a conversation with Mark Shults, the person who filed a decertification petition and Fidel Betancourt both of whom were aware that Cancel was an active union supporter. He states that Shults asked if he (Cancel), was aware that he was trying to get rid of the Union. Cancel testified that Shults asked if he wanted to go speak to Carreto. According to Cancel, when they arrived at the office, Betancourt said that they were looking for some sort of written contract and benefits to get the Union out, to which Carreto replied that he was listening. He states that Betancourt said that they were looking for some sort of written contract setting forth better wages and benefits, and that Correto responded that it would be against the law to give a written contract. Cancel asserts that when he asked how they could be assured of benefits, Carreto stated that once the Union was out, they would get higher wages and a 4-day, 10-hour week. According to Cancel, Betancourt said that the conversation should be kept a secret between the people involved.

Carreto testified that Betancourt was the person who initiated the meeting described above. He states that Betancourt said that they had been talking about a decertification petition and that Cancel had some questions about it. Carreto states that Cancel asked if the Company would guarantee raises if the employees voted the Union out and that he replied, "no." He also testified that Cancel asked if people would get fired if the Union was voted out and also asked that Carreto put something (he can't recall what), in writing. Carreto states that he told Cancel and the other two men that he could not write anything down, that the Company would not discharge anyone and that in response to Cancel's question about raises, stated that the employees at this facility would be treated the same as any other TNT employees. Finally, Correto states that Cancel asked if it was possible to have a 4-day, 10-hour week and, he responded that this would be something that would have to be discussed later on. Correto denies that he made any promises at this meeting and denies saying that if the Union was voted out, wages would automatically go up or that the Company would give them a 4-day, 10-hour week.

It appears to me that the gist of this conversation, was that Cancel, Betancourt, and Shults went to Carreto to discuss what might happen if a decertification petition was filed and the Union was voted out. From the testimony of Cancel and Carreto, it seems that either Cancel or Betancourt tried to press Carreto into making a commitment to give raises and other benefits and tried to get such a commitment in writing. All agree that Carreto refused to put anything in writing and said that it would be against the law. My view of the testimony, taken as a whole, is that Carreto, who more than likely was aware that Cancel was a prounion supporter, did not make any promises to these three men and at most, merely stated what the Company's prior positions had been regarding wage increases and the workweek and also stated that the employees at this location would be treated the same as employees at other facilities.

### *G. Changes in Starting Times*

The complaint alleges that the Respondent, for discriminatory reasons, changed the starting times of Jose Vasquez and Michael Yanis, two of the most active employees for the Union. For the reasons stated below, I shall recommend dismissal of this allegation.

The fact that Vasquez and Yanis had their starting times changed on various occasions during 1993 and 1994 is not an experience unique to them. The evidence shows that they along with many of the other drivers have had their start times altered. The Company is engaged in the delivery and pickup of parcels within the City of New York and each driver is assigned to a particular zone. The Company's raison d'être is fast delivery and to that end, schedule changes are not unusual. The starting time changes complained of by the General Counsel were relatively minor and there is no evidence that these changes adversely affected the employment conditions of Yanis or Vasquez or any other employee for that matter.

## CONCLUSIONS OF LAW

1. By reneging on tentative agreements previously made during the course of negotiations with Local 851, International Brotherhood of Teamsters, AFL–CIO, the Respondent bargained in bad faith and violated Section 8(a)(1) and (5) of the Act.

2. By withdrawing recognition from Local 851, International Brotherhood of Teamsters, AFL–CIO, the Respondent violated Section 8(a)(1) and (5) of the Act.

3. By promulgating a rule precluding access of off duty employees in order to prevent them from engaging in union solicitation and other protected concerted activity, the Respondent has violated Section 8(a)(1) of the Act.

4. By unilaterally changing its prior policy and practice regarding the use of seniority for selection of vacation preferences, the Respondent has violated Section 8(a)(1), (3), and (5) of the Act.

5. The aforesaid unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Except as specifically found herein, the Respondent has not violated the Act in any other manner alleged in the complaints.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The General Counsel and the Charging Party argue that having had the negotiations subverted just at the time when an agreement was expectant, the Union should be given the opportunity not merely to resume bargaining but to accept or reject the Respondent's penultimate contract proposals prior to the reneging on August 27, 1993.

In *Mead Corp. v. NLRB*, 697 F.2d 1013, 1022 (11th Cir. 1983), the court enforced the Board's remedy which ordered the Company to reinstate the contract offer it had made prior to its retraction. The court stated

> In support of its contention that the remedial order is improper because it compels an agreement, the Company cites *H.K. Porter Co. v. NLRB*, 397 U.S. 99, (1970). However, *H.K. Porter Co.* is clearly distinguishable from the case at bar. In *H.K. Porter Co*., the Board entered a remedial order "requiring the Company to agree to check off the [Union] dues of the workers." The Supreme Court held that while the Board does have power . . . to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of the collective bargaining agreement . . . ." Unlike the remedial order in *H.K. Porter Co*., the remedial order in the case at bar does not compel an agreement but rather merely requires the Company to reinstate a proposal it previously voluntarily presented during negotiations and subsequently withdrew in violation of the Act.
>
> The Board concluded that simply ordering the Company to bargain in good faith, without more, would permit the Company to continue to withhold from future consideration the proposal it unlawfully withdrew. By requiring the Company to reinstate the August 27, 1979 proposal for 20 consecutive days, the Board was able to restore the status quo without imposing an undue burden upon the Company.

Citing *Northwest Pipe & Casing Co.*, 300 NLRB 737 (1990), the Union argues that it should be given 30 days to accept the Employer's last offer and that if does so, the contract which would come into effect would be for 3 years from September 1, 1993,to August 31, 1996, and that it be given retroactive effect. See also *Driftwood Convalescent Hospital,* 312 NLRB 247 (1993), enfd. 67 F.3d 307 (9th Cir. 1995).

I agree that a cease-and-desist order which merely puts the parties back at the bargaining table would not, in the circumstances of this case, be a sufficient remedy. I therefore shall recommend an Order whereby the Union is given the option within 30 days to accept or reject the Company's proposals as they stood prior to August 27, 1993, and that the Company be required to enter into a 3-year contract, retroactive to September 1, 1993, if the Union elects to accept the offer. September 1, 1993, is chosen as the date from which the contract, if accepted, should commence since it is close to August 27, the date upon which the Respondent's unfair labor practice was manifested.

In reaching this conclusion, I am aware that there is no single document which sets forth the Company's last offer as it existed prior to August 27. Nevertheless, there does exist a number of draft contracts and correspondence from which the Company's pre-August offer can be reconstructed. As noted above, Chaiet by his letter of June 29, 1993, stated that there were only 4 open issues and he set forth the Company's position on each. In response to a letter from Chaiet dated July 20, 1993, Archer, on August 2, forwarded a draft contract which incorporated most of what the parties had agreed to up to that point. And to the extent that Archer's draft incorporated union counterproposals, these can be deleted. (Indeed, Archer indicated his counterproposals by bolding the script where they located).

In the event that the Union does not elect to accept the Company's pre-August 1993 contract offer, I shall recommend that the Respondent resume bargaining with the Union and that the certification year be extended by 6 months. See *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), and *Colfor, Inc*., 282 NLRB 1173 (1987).

Finally, because the Respondent has a proclivity for violating the Act and because of the serious nature of the violations, I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

[Recommended Order omitted from publication.]